

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. 99090433
)	
Infinity Radio License, Inc.)	NAL/Acct. No. 2001320800008
)	FRN: 0004-0367-11
Licensee of Station WLLD(FM),)	Facility ID #18527
Holmes Beach, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2002

Released: September 27, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the petition for reconsideration filed April 2, 2001, by Infinity Radio License, Inc. ("Infinity"), licensee of Station WLLD(FM), Holmes Beach, Florida. Infinity seeks reconsideration of a Forfeiture Order, which imposed a \$7,000 forfeiture for a willful violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, which prohibit the broadcast of indecent material. *Infinity Radio License, Inc.*, 16 FCC Rcd 4825 (Enforcement Bureau 2001) ("*Forfeiture Order*")

2. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). A petition that simply reiterates arguments previously considered and rejected will be denied. *Id.*; *Gaines, Bennett Gilbert*, 8 FCC Rcd 3986 (Rev. Bd. 1993). Review of Infinity's petition and the *Forfeiture Order* reveals that the *Forfeiture Order* contains no material error or omission and that the petition by and large repeats arguments already considered and rejected. Accordingly, denial is warranted. Nevertheless, we believe two of Infinity's arguments merit a brief discussion.

3. Infinity observes that in February 2001, the Bureau dismissed an indecency complaint submitted against WRLR(FM), Homewood, Alabama. Infinity notes that Commissioner Tristani objected to this dismissal because, *inter alia*, the complainant heard the word "pussy" used in a "foul" and "obscene" manner.¹ Infinity believes that the *Forfeiture Order's* finding that WLLD(FM) aired indecent material and merits a forfeiture results in prohibited disparate treatment.² We disagree. As discussed in the *Forfeiture Order*, the cited material repeatedly referred to a sexual activity (cunnilingus) in a patently offensive manner through repeated use of the phrase "eating pussy." In this regard, we found that the offensive sexual references were both explicit, graphic and not fleeting. By comparison, the dismissed complaint against WRLR(FM)

¹ See February 13, 2001, "Press Statement of FCC Commissioner Gloria Tristani."

² See *Melody Music, Inc. v. FCC*, 345 F.2d 750 (D.C. Cir. 1965).

provided no information which could reasonably support a conclusion that the use of the word “pussy” rendered the material at issue actionably indecent. Unlike the tape recording of the material broadcast by WLLD(FM) (*see* Attachment), the description of the material supposedly broadcast by WRLR(FM) did not even show as a threshold matter that the offending word was actually referring to a sexual organ or was used in connection with the description of a sexual activity. Accordingly, we reject the contention that, because we dismissed the complaint against WRLR(FM), we were likewise compelled to dismiss the complaint against WLLD(FM).

4. We also disagree with Infinity that the Commission’s decision in *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838 (2000) warrants dismissal of the complaint. There, although the material at issue (scenes of full frontal nudity) clearly depicted sexual organs, its context – the subject matter of the film (*Schindler’s List*), the manner of its presentation, and the warnings that accompanied the broadcast of the film – rendered the material not patently offensive as measured by contemporary community standards for the broadcast medium. 15 FCC Rcd at 1542. With respect to the utterances broadcast by WLLD(FM), Infinity does not point to (nor can we perceive) anything we have not already considered about the context of the material that would render it acceptable for the broadcast medium. In this regard, we disagree with Infinity that the contextual analysis in *Flambo Broadcasting, Inc.*, 9 FCC Rcd 1681 (Mass Media Bureau 1994), shields the WLLD(FM) broadcast. In *Flambo*, the Bureau addressed a complaint alleging that two crude jokes concerning oral sexual activities were indecent. The Bureau chose not to take further action relative to the first joke because it could not resolve a conflict as to what exactly was broadcast. In this regard, the licensee contended that it cut off the caller immediately after the offensive words were uttered. Thus, assuming that the joke had been cut off, the Bureau concluded that no violation occurred because the offensive broadcast at issue was brief, live, unscripted and came from an outside source. By comparison, there is no dispute as to what WLLD(FM) broadcast, and, even though the material was apparently unscripted, live and from one of the concert’s performers, it was hardly brief. In addition, as noted above, the material was graphic, explicit and offensive.

5. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed April 2, 2001, by Infinity Radio License, Inc. IS DENIED.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, within thirty (30) days of the release of this Order. *See* 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

7. IT IS FURTHER ORDERED THAT a copy of this Order shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Radio License, Inc., 2000 K Street, N.W., Suite 725, Washington, D.C. 20006 and to Steven A.

Lerman, Esq., Leventhal, Senter & Lerman P.L.L.C., 2000 K Street, N.W., Suite 600,
Washington, D.C. 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

ATTACHMENT

Radio Station: WLLD(FM), Holmes Beach, Florida
Date/Time Broadcast: September 11, 1999, between 6 p.m. and 10 p.m.
Material Broadcast: "The Last Damn Show" (Comments before a large crowd)

MV: Male Voice

MV: We ain't going to have no more feedback problem. Fuck it. We're going to go all the way back where you all feel (Unintelligible) mother fucking noise. (Unintelligible) God damn, where are my pussy eating niggers? Any my niggers into eating pussy? Y'all make some noise. Hey, where are the girls? If you're eating pussy, where you at? That's it. Oh, they all like it. I ain't eating no pussy tonight. If you all don't like it, fuck it. I ain't going to beg you. You like it? [Edit] And my dog don't give a fuck and we'll fuck you sucking up coke, you know. Trying to explain this shit away, niggers. I don't think y'all heard me.